

D E S P O S E	COUR FÉDÉRALE FEDERAL COURT	F I L E D
	MAR 09 2012	
	Maxim Didkovski	
	MONTREAL, QC	

Court File No: T-577-12  
Montreal Registry

FEDERAL COURT

BETWEEN:

TAREK SABRA

Applicant

AND

THE ATTORNEY GENERAL OF CANADA

Respondent

Application under sections 18 and 18.1 of the *Federal Courts Act*

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NOTICE OF APPLICATION

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TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and a place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard in Montreal.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Court Rules* and serve it on the Applicant's solicitor, or where the Applicant is self-represented, to the Applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary documentation may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN  
IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Dated this 9th day of March, 2012

Issued by:

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Registry officer  
Montréal Local Office  
30 McGill Street  
Montréal, Québec  
H2Y 3Z7

TO: THE ATTORNEY GENERAL OF CANADA

284 Wellington Street  
Ottawa, Ontario K1A 0H8

TO: THE CANADA REVENUE AGENCY

305 René-Levesque Boulevard West  
Montréal, Québec H2Z 1A6

TO: ÉRIC VAILLANCOURT

165, rue de la Pointe-aux-Lièvres  
Québec, Québec G1k 7L3

TO: THE MINISTER OF NATIONAL REVENUE

555 MacKenzie Avenue, 7<sup>th</sup> Floor  
Ottawa ON K1A 0L5

## APPLICATION

**A. This is an application for judicial review:**

1. The Applicant is hereby filing an application for judicial review of a decision rendered by the Canada Revenue Agency ("CRA"), on February 10, 2012, by which the CRA illegally ordered the Applicant to communicate information and documents within thirty (30) days ("Decision"), the whole as will be more fully explained hereinafter;

**B. The Applicant makes application for:**

2. The Applicant is requesting this Honorable Court to quash such Decision as the CRA is clandestinely conducting a criminal investigation against the Applicant under the guise of a civil audit by illegally using Stolen Data, as defined herein-below, obtained from the HSBC Private Bank (Suisse) S.A. and/or the HSBC Republic Bank (Suisse) S.A. ("Swiss HSBC"), the whole in the circumstances that will be outlined herein-below;
3. Through his application for judicial review of said Decision, the Applicant is also seeking declaratory and injunctive conclusions with respect to the use of the Stolen Data by the CRA, the whole as more fully detailed in the conclusions of the present application;

**C. The grounds for the application are:**

*The context*

4. Since 2010, the CRA has begun a massive criminal investigations for alleged tax evasion against Canadian Swiss HSBC account holders, including the Applicant, in the circumstances detailed herein below;
5. On or about the years 2006 and 2007, Hervé Falciani ("Falciani"), an employee of the Swiss HSBC illegally reproduced and/or stole data from the Swiss HSBC records and pertaining to clients of the Swiss HSBC, without Swiss HSBC consent nor its clients' consent (referred hereinafter as the "Stolen Data"), the whole as appears from numerous newspapers articles;
6. It is public knowledge that Falciani offered for sale the Stolen Data to foreign tax authorities to allow them to prosecute Swiss HSBC account holders because the Stolen Data allegedly would demonstrate unlawful tax evasion by account holders, the whole as appears from numerous newspapers articles;
7. On or about January 2009, the French authorities, in cooperation with the Swiss authorities investigating the theft, seized the Stolen Data from Mr. Falciani's home, the whole as appears from numerous newspapers articles;
8. On or about January 12, 2009, the CRA requested the French authorities to provide them with the list of names of Canadian Swiss bank account holders in France's possession and any information related to them, under section 26 of the Tax Treaty between Canada and France, the whole as appears from the letter signed by Patricia Spice;
9. On or about May 2010, the CRA obtained from the French authorities the list of names of Canadian Swiss bank account holders in France's possession and

information related to them, in full or in part, pertaining to the Canadian Swiss account holders, based on section 26 of the Tax Treaty between Canada and France, the whole as more fully appears from the letter signed by Maïté Gabet;

10. In connection with the receipt of such list, on September 30, 2010, the Prime Minister of Canada, the Honourable Stephen Harper, declared before the House of Commons that "if some citizens use Swiss bank accounts to avoid paying lawful taxes, the government will prosecute them to the full extent of the law", the whole as appears from an extract from the House of Commons debates on the same date;
11. The Prime Minister's intention to prosecute citizens who have held undisclosed Swiss bank accounts was reaffirmed by the Minister of National Revenue, on the same date, before the House of Commons, where he said "that tax cheating is a crime" and that his Ministry "will use any necessary measures to ensure that law is abided by", the whole as appears from an extract from the House of Commons debates on the same date;
12. The Minister's intentions were further confirmed, on September 30, 2010, by the CRA which stated that it had "recently received information from the government of France about HSBC account holders" and that "all accounts that are linked to Canadian taxpayers will be reviewed", the whole as appears from the CRA News Release dated September 30, 2010;
13. It is obvious that the list of names of Canadian Swiss bank account holders and information related to them transmitted by the French authorities to the CRA is, or is a portion of or is derived from the Stolen Data;
14. It is obvious that the CRA, when they requested and obtained the list of names of Canadian Swiss bank account holders in France's possession and information

related to them, knew or ought to know that this information is, or is a portion of, or is derived from the Stolen Data;

15. In accordance with its stated intention as described above, the CRA has commenced to use the Stolen Data to investigate Canadian Swiss HSBC account holders since letters and questionnaires, similar to the one received by the Applicant, have also been sent at least to the undersigned attorneys' clients;
16. Furthermore, at least a few other taxpayers, who were also Canadian Swiss HSBC account holders, have received questionnaires and peremptory demands requesting for documents and information regarding their foreign assets, similar to the one received by the Applicant, the whole as appears, for example, from their application to the Federal Court of Vancouver in judicial review, dated May 4, 2011. Their proceedings have since been discontinued;
17. On February 8, 2011, the Cour d'appel de Paris, in *X c. Le Directeur général des finances publiques, direction nationale d'enquête fiscales*, decided that Stolen Data could not be used by the French tax authorities against its citizens in the process of tax audits, the whole as appears from the judgment;
18. This decision was brought to the attention of the CRA by the undersigned attorneys on July 20, 2011;
19. Since then, the decision of the Cour d'appel de Paris was maintained by the Cour de Cassation, the higher judicial instance of France, on January 31, 2012, the whole as appears from a copy of said judgment;
20. It appears from the foregoing that the CRA knew or ought to know that it obtained, from the French authorities, Stolen Data or a portion thereof or information derived from the Stolen Data;

21. It further appears from the foregoing that the CRA and the Minister of National Revenue's intentions in obtaining the Stolen Data, or portion thereof or information derived from the Stolen Data, was and is to use the Stolen Data to prosecute for tax evasion every Canadian who used Swiss bank accounts to avoid paying lawful taxes, including Swiss HSBC account holders;
22. It further appears from the foregoing that the CRA is conducting an undisclosed criminal investigation for tax evasion against Canadian Swiss HSBC account holders, including the Applicant, based on the Stolen Data or a portion thereof or information derived from the Stolen Data;

**D. CRA illegal acts against the Applicant**

23. Around June 2011, the CRA began a criminal investigation against the Applicant for taxation years 2005 to 2009, including foreign revenues but, in so doing, claimed that their inquiries were within the scope of a civil audit, allegedly undertaken under the broad CRA power to investigate taxpayers under section 231.1 of the *Income Tax Act* ("ITA");
24. The CRA Aggressive International Tax Planning Division ("CRA Aggressive Division") sent a letter to the Applicant and his family members advising them that their income tax returns "had been selected" for an audit and requesting that they complete an eighteen (18) page questionnaire asking for various information, income tax returns and other forms, including but not restricted to form T1135 "Foreign Income Verification Statement", the whole as more fully appears from a copy of CRA's letters dated June 8, 2011 and one of the attached questionnaires;
25. Further to the receipt of such questionnaire, the Applicant and his family members mandated the undersigned attorneys to represent them in the context of the CRA inquiries. Accordingly, the undersigned attorneys have been in communication with Mr. Eric Vaillancourt, from the CRA Aggressive Division,

on behalf of the Applicant and the family members, the whole as appears from the Authorizing Representative Forms signed on June 22, 2011, by the Applicant and family members;

26. On July 5, 2011, Mr. Vaillancourt verbally advised the undersigned attorneys that:

- a. The CRA was interested in the Applicant's and family member's offshore assets;
- b. The CRA would accept that only one questionnaire be completed and that the Applicant could speak in the name of the all family members;
- c. The CRA already had in its possession information pertaining to offshore assets involving the Applicant or his family members;
- d. The Applicant's audit was being conducted in the context of a specific national project;
- e. The CRA wanted to verify what the Applicant and his family members had to declare with respect to their offshore assets;

27. Further to Mr. Vaillancourt's declarations, it became obvious that, without the benefit of the Stolen Data, or a portion thereof or information derived therefrom, the CRA would not have commenced a civil audit or criminal investigations against the Applicant regarding his foreign assets;

28. It further became obvious that the CRA is already in possession of information to assess the Applicant regarding his foreign income but, rather than do so, the CRA wants to conduct criminal investigation for tax evasion under the guise of a civil audit (1) to obtain self-incriminating information from the Applicant

  
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40. It is to be noted that the CRA is also entitled, under section 238(1) of the *ITA*, to initiate penal proceedings to enforce the Decision, including potential fines and imprisonment;
41. The Applicant submits that he is well founded not to comply with the CRA's letter dated June 8, 2011 and the Decision as;
- a. The CRA is currently conducting an illegal criminal investigation for tax evasion against the Applicant under the guise of a civil audit;
  - b. The CRA is currently conducting an illegal criminal investigation for tax evasion against the Applicant based on the Stolen Data or a portion thereof, or information derived from the Stolen Data, which is illegal;
42. Subsidiary, if this Honorable Court determines that the CRA is not conducting a criminal investigation at this stage, the Applicant submits that he is well founded not to comply with the CRA's letter dated June 8, 2011 and the Decision as the CRA is currently conducting an illegal civil audit based on the Stolen Data or a portion thereof, or information derived there from, which is illegal;

*The Applicant's fundamental rights at stake*

43. As explained above, the CRA is engaged in a current criminal investigation for tax evasion against the Applicant and, accordingly, the Applicant respectfully submits that the CRA cannot use its powers under section 231.1 and 231.2 of the *ITA* without contravening the Applicant's fundamental rights under sections 7 and 8 of the *Canadian Charter of Rights ("Charter")*;
44. The CRA's request to the French authorities to be provided with the Stolen Data, a portion hereof or information derived from was illegal as it was not

authorized under section 26 of the *Tax Treaty* between the Canada and France as such *Tax treaty* cannot be used for:

- a. Obtaining information from a foreign state that the requesting state is not otherwise entitled to obtain and use under its own laws;
  - b. Obtaining information from a foreign state that the foreign state is not entitled to obtain and use under its domestic laws;
45. The CRA's illegal request to the French authorities to be provided with the Stolen Data, a portion hereof or information derived therefrom, under section 26 of the *Tax treaty* between France and Canada, violated Applicant's fundamental rights under section 8 of the *Charter*;
46. In using the Stolen Data, or a part thereof or information derived from the Stolen Data, to conduct a civil audit and/or a criminal investigation for tax evasion against the Applicant, the CRA is further contravening to the Applicant's fundamental rights under section 7 of the *Charter* ;
47. The Decision regarding the Applicant was rendered for an improper purpose, based upon the Stolen Data or a portion thereof, or information derived from the Stolen Data, which is illegal;
48. The CRA is acting without any statutory authority under the *ITA* and is violating the Applicant's fundamental rights set forth in the *Charter*;
49. Accordingly, the CRA's Decision is invalid and unlawful and should be quashed by this Honorable Court;

**E. This application will be supported by the following material:**

50. The Applicant will file into the Court record, within thirty (30) days from the date of issuance of the present application or within the extended delays ordered by this Honorable Court, an affidavit in support of his motion signed David H. Sohmer, from the undersigned offices; and
51. Exhibits in support of same affidavit; and
52. Any other material that the undersigned attorneys may deem advisable;

**F. Request under section 317 of the Federal Courts Rules**

53. Pursuant to Rule 317 of the Federal Courts Rules, the Applicant requests that the Respondent provide the Applicant with:
  - a. a complete copy of all documents in the possession of the CRA or the Minister of National Revenue (including their current or former officers, employees or agents) in undertaking and engaging the enforcement mechanism of the *ITA* against the Applicant and authorized signatories;
  - b. This includes, but is not limited to, all such information in the possession, control or files of Mr. Eric Vaillancourt;
54. Pursuant to Rule 317 of the Federal Courts Rules, the Applicant further requests that the Respondent provide the Applicant with a complete copy of all communications, of any kind, between the CRA the Minister of National Revenue and the Prime Minister or any of his deputy-minister or authorized representative, or any agent or employee thereof, with respect to the tax treatment of Canadian Swiss HSBC account holders;

55. Pursuant to Rule 317 of the Federal Courts Rules, the Applicant further requests that the Respondent provide the Applicant with a complete copy of all communications between the HSBC or the Government of France, or any agent or employee of either, and the CRA, the Minister of the National Revenue, the Prime Minister or any Member of Parliament or any agent or employee of any of them, with respect to the tax treatment of Canadian Swiss HSBC account holders;
56. Pursuant to Rule 317 of the Federal Courts Rules, the Applicant further requests that the Respondent disclose to the Applicant the following:
- a. the number of Canadian Swiss HSBC account holders identified in the Stolen Data, or in a portion hereof or in information derivative therefrom; and
  - b. the number of Canadian Swiss HSBC account holders against whom enforcement action has commenced and an indication of whether they are being considered for audits or criminal investigations by the CRA; and
  - c. the number of voluntary disclosures accepted from Canadian Swiss HSBC account holders, the dates on which those voluntary disclosures were initiated; and
  - d. the date on which any enforcement action against those Canadian Swiss HSBC account holders was commenced.
57. The present motion is well-founded in fact and in law.

WHEREFORE, THE APPLICANT PRAYS THIS HONOURABLE COURT  
FOR JUDGMENT:

MAINTAINING the present Application;

*The criminal investigations*

1. **DECLARING** that the CRA and the Minister of National Revenue are currently conducting illegal criminal investigations against the Applicant under the guise of a civil audit;
2. **ORDERING** the CRA and the Minister of National Revenue to cease any criminal investigations against the Applicant, whether directly or indirectly, by using their civil audit powers under the *ITA*;

*The illegal obtention of the Stolen Data*

3. **DECLARING** that the CRA's request to the French authorities under section 26 of the *Tax Treaty* between the Canada and France to be provided with the Stolen Data or a portion thereof, or information derived therefrom, was illegal as non-authorized under the *Tax Treaty*;
4. **DECLARING** that the CRA's request to the French authorities under section 26 of the *Tax Treaty* to be provided with the Stolen Data or a portion thereof, or information derived therefrom, was illegal as it violated the Applicant's rights guaranteed by section 8 of the *Charter*;

*The illegal use of the Stolen Data*

5. **DECLARING** that the CRA and the Minister of National Revenue are using Stolen Data or a portion thereof, or information derived therefrom, in support of their criminal investigations and/or civil audit against the Applicant;
6. **DECLARING** that the CRA and the Minister of National Revenue use the Stolen Data or a portion thereof, or information derived therefrom, in support of their criminal investigations and/or civil audit against the Applicant is violating Applicant's rights guaranteed by section 7 of the *Charter*;
7. **PROHIBITING** the CRA and the Minister of National Revenue and their agents to use and to continue to use the Stolen Data or a portion thereof or information derived therefrom, in the context of their enforcement powers under the *ITA*;

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***The Decision***

8. **DECLARING** that the Decision was rendered in the context of criminal investigations against the Applicant;
9. **DECLARING** that, as such, the Decision is illegal, null and void as it violates Applicant's rights guaranteed by sections 7 and 8 of the *Charter*;
10. **DECLARING** that the Decision is based on the Stolen Data or a portion hereof or information derived therefrom;
11. **DECLARING** that, as such, the Decision is illegal, null and void as it violates Applicant's rights guaranteed by section 7 of the *Charter*;
12. **QUASHING** the Decision;
13. **PROHIBITING** the CRA and the Minister of National Revenue and their agents to send to the Applicant any further request under their enforcement powers under the *ITA* based on the Stolen Data or a portion thereof, or information derived there from;

**SUBSIDIARILY:**

14. **AUTHORIZING** the Applicant to provide the requested documentation and information in the Decision within ninety (90) days from the final judgment to be rendered;
15. **THE WHOLE**, with costs.

MONTREAL, March 9, 2012

**SPIEGEL SOHMER INC.**



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